

MAY 25 1979

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1550

MORGAN THOMAS - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - - - - - Respondent

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY****ROBERT F. STEPHENS***Attorney General*

Commonwealth of Kentucky

MARTIN GLAZER*Assistant Attorney General*120 State Capitol
Frankfort, Kentucky 40601*Of Counsel for Respondent*

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MORGAN THOMAS - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

May it please the Court:

OPINIONS BELOW

(Set out in Petition.)

JURISDICTION

(Set out in Petition.)

QUESTION PRESENTED

Whether the dismissal of an appeal in the state court pursuant to rules of that court constitute a violation of the Fourteenth Amendment, the due process clause of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS

FOURTEENTH AMENDMENT, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner originally appealed his conviction for Theft by Taking in the Breathitt Circuit Court of Kentucky to the Kentucky Court of Appeals by filing a timely Notice of Appeal. He requested additional time to file his record on appeal, and the Breathitt Circuit Court granted an extension to the 6th day of April, 1978. On that date, he sought an enlargement of time within which to certify the record. This motion was filed in the Kentucky Court of Appeals. The Clerk of the Kentucky Court of Appeals declined to accept the motion because it was not accompanied by *certified* copies of the trial judgment of conviction and the notice of appeal. Further, he failed to file certified copies of the order of the trial court granting his extension of time to certify the record. Petitioner finally corrected this deficiency by filing certified copies of the necessary papers on April 12, 1978, which was six

days after the extension of time granted to him by the trial court to certify the record.

Based upon this late filing of the proper motion together with certified papers, the Kentucky Court of Appeals dismissed his appeal as untimely perfected. He moved that Court to reconsider its dismissal order which was refused.

Petitioner then filed a motion for discretionary review in the Supreme Court of Kentucky (similar to a petition for writ of certiorari in this Court) which was denied by the Supreme Court of Kentucky on November 14, 1978. He then requested the Kentucky Court of Appeals to stay its mandate for ninety days from January 12, 1979, pending an application for a writ of certiorari to the United States Supreme Court which was granted. That ninety day period expired April 12, 1979. Respondent has no record that any motion for additional stays of the mandate of the Kentucky Court of Appeals was filed subsequent to the original stay either in that court or this one. So, the original order dismissing petitioner's appeal is now final.

His present petition for a writ of certiorari was filed April 12, 1979 (although copy was not received by respondent until April 30, 1979).

ARGUMENT AND REASONS FOR DENYING THE WRIT

Petitioner contends that the Kentucky Court of Appeals' dismissal of his appeal violated his Fourteenth Amendment right under the Constitution of the United States to his *state* right of appeal.

First of all, there is no *federal* constitutional right to a state appellate review of a state criminal conviction. *Estelle v. Dourrough*, 95 S. Ct. 1173, 420 U. S. 534, 43 L. Ed. 2d 377; rehearing denied 95 S. Ct. 1589, 421 U. S. 921, 43 L. Ed. 2d 790, on remand 512 F. 2d 1061 (U.S. Texas 1975).

And even a state does not have to provide an appeal. *Ross v. Moffett*, 94 S. Ct. 2437 (U.S. N.C. 1974).

Of course, once a state provides an appeal procedure, it must apply it equally to all.

Certainly, a state may fashion rules for the proper and orderly consideration of appeals.

Even this Court has dismissed appeals to it for failure to docket a case within the time prescribed by rules of this Court. *Shapiro v. Doe*, 90 S. Ct. 641, 396 U. S. 488, 24 L. Ed. 2d 677, rehearing denied 90 S. Ct. 991, 397 U. S. 970, 25 L. Ed. 2d 264 (U.S. Conn. 1970) (Sup. Ct. Rules, rule 13).

And, Kentucky likewise may fashion rules for the orderly administration and processing of appeals before its courts, which if violated may result in dismissal of those appeals.

Kentucky Civil Rule 75.10 provides:

"If at any time before the record on appeal to the Court of Appeals or Supreme Court has been transmitted to the appellate court a party desires to move that court for a dismissal, for a stay pending appeal, for additional security on the supersedeas bond, or for any other intermediate order, the clerk of the trial court at his request shall *certify* and transmit to the appellate court whatever portion of the record is needed for that purpose." (Emphasis supplied.)

Also, Civil Rule 76.33 provides:

"(1) When Authorized. At any time after a notice of appeal has been filed a party to the appeal may move the appellate court for intermediate relief, which may be granted *ex parte* upon a satisfactory showing that otherwise he will suffer immediate and irreparable injury before a hearing may be had on the motion.

(2) Record Required. Unless the record on appeal has been transmitted to the appellate court, a motion for intermediate relief will not be docketed for consideration *until the movant has filed, or caused to be filed as authorized by Rule 75.10, the judgment or order from which the appeal was taken, the notice of appeal, and such portion of the record as may be necessary for a decision on the motion.*

(3) Costs. Payment of the filing fee specified in Rule 76.42(2)(a) shall be required with the motion." (Emphasis supplied.)

The Kentucky Rules' requirement for certified copies of appropriate papers accompanying a motion is a reasonable and practical requirement. Inasmuch as the appellate court does not have a trial record before it, before it is filed, the court needs authentic, certified copies of appropriate portions of the trial record in order to dispose of motions for intermediate relief.

Here, the petitioner (appellant in the state court) moved for additional time in the appellate court to certify and prepare the record for appeal. Not having the record before it, the appellate court needed the certified copy of the judgment, notice of appeal, and

orders granting additional time to certify the record, which papers were filed in the trial court. Without these orders and motions, the appellate court could not know if the motion before *it* was timely or out of time. Thus, a motion filed without these necessary papers properly certified as truly in the trial record is no motion at all. Until these were properly filed, they were not before the appellate court and when ultimately filed, they were filed *out of time* and justified the court's dismissal of the appeal.

The Constitution of the United States does not guarantee the right to have docketed an improperly filed appeal in a state court. Nor does it grant a petitioner the right to have filed an improperly filed appeal in this court.

Kentucky has the right to promulgate rules for its court system and to require adherence to those rules by those seeking to avail themselves of appellate procedure as long as those rules are impartially administered and the rules in existence are reasonable ones to accomplish an orderly procedure for appeal.

There is no proof that the Kentucky Court of Appeals is discriminating against petitioner by enforcing these rules while not enforcing them against others similarly situated.

In *Wainwright v. Sykes*, 433 U. S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977), this court set out the "contemporaneous objection" rule, that an objection must be timely made to be considered on appeal. Otherwise, the issue has been waived.

By extension that rule could apply to a contention that an appeal's dismissal violated constitutional principles. One seeking to avail himself of an appeal must properly follow the rules for appellate procedure. Without such adherence and the enforcement of such rules, appeal procedure would be not enhanced but stymied and end in a jumbled morass, which even an astute judiciary could not disentangle.

There is no federal question here; only an enforcement of state law and state court rules. Obviously, the Kentucky courts can interpret their own rules. And they have done so consistently and equally for a number of years. An example is the case of *Evans v. Commonwealth*, Ky., 450 S. W. 2d 509 (1968) (copy attached as appendix). In that case, the Kentucky court extended the time to file the record but warned in 450 S. W. 2d at 510:

"We are calling attention to the fact that hereafter we will not grant extensions of time under CR 73.08 unless the movant makes it abundantly clear that his time for filing the record has not already expired when the motion under CR 73.08 is made."

That case was decided in 1968 and there the court explained the proper procedure—that is—the movant must file certified copies of the lower court's order extending the time for filing the record to indicate that "the movant's time for filing his record has not run out."

This petitioner did not follow that requirement; his appeal was dismissed.¹

There is no federal constitutional issue presented by the petition; there is only an interpretation and application of state law and state court rules. The Kentucky courts interpreted those rules against petitioner. As long as those rules for appeal are reasonable ones and are applicable equally to all, the dismissal of an appeal in violation of those rules is a question of state law and does not rise to the level of a constitutional question reached by certiorari to this Court. The petition should be denied.

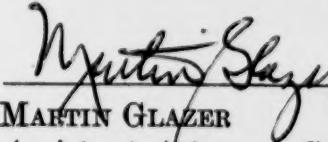
Respectfully submitted,

ROBERT F. STEPHENS
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PROOF OF SERVICE

I, Martin Glazer, one of counsel for the Respondent, hereby certify that three (3) copies of the foregoing Brief for Respondent in Opposition to Petition for a Writ of Certiorari to the Court of Appeals of Kentucky were mailed, postage prepaid, this 29th day of May, 1979, to Honorable Blake Page, Counsel for Petitioner, Fifth Floor—McEldowney Building, Winchester, Kentucky 40391.


 MARTIN GLAZER
Assistant Attorney General

¹We also note that petitioner continues to ignore the rules—even of this court. Although filing his petition on April 12, 1979, he did not mail three copies to respondent (Rule 33(1)). We have no notice that proof of service was filed as required by Rule 21(3). Only after calling petitioner's counsel did we receive one copy of the petition on April 30, 1979.

APPENDIX

APPENDIX**EVANS v. COMMONWEALTH**

Cite as, Ky., 450 S. W. 2d 509
Jincie Jenette **EVANS**, Appellant,

v.

**COMMONWEALTH of Kentucky and
Board of Claims, Appellees.**

Court of Appeals of Kentucky.
Dec. 13, 1968.

Proceeding on motion to reconsider denial of motion to extend time for filing record on appeal from an adverse judgment of the Circuit Court, Johnson County, James B. Stephenson, Special Judge. The Court of Appeals, Davis, C., held that where appellant accompanied motion to reconsider with certified copy of circuit court order of September 20, 1968 extending time for filing record to and including November 24, 1968, rule governing extension of time for filing of record was followed, and where appellant moved Court of Appeals to further extend time for filing record on November 18, 1968, on which date time for filing had not expired, court sustained motion for additional extension.

Motion for extension of time sustained.

1. Appeal and Error, Key 624

If Court of Appeals is requested to extend time for filing record on appeal, movant should demonstrate that his time for filing record has not expired by providing court with certified copy of the circuit court's order extending his time for filing record. CR 73.08, 75.10.

2. Appeal and Error, Key 505

In any appealed case in which motion is filed for new trial or amendment of judgment so as to terminate running

of time for taking appeal, record should show motion and date on which it was overruled so that Court of Appeals can be informed whether notice of appeal was in time. CR 59.01 et seq., 73.02.

3. Appeal and Error, Key 624

Where, on motion to reconsider denial of motion to extend time for filing record, appellant included certified copy of circuit court order of September 20, 1968 extending time for filing record to and including November 24, 1968, rule governing extension of time for filing of record was followed and where appellant moved Court of Appeals to further extend time for filing record on November 18, 1968, on which date time for filing had not expired, court sustained motion for additional extension. CR 73.08.

4. Appeal and Error, Key 624

Court of Appeals will not grant extension of time for filing record on appeal unless movant makes it clear that his time for filing record has not already expired when motion for extension of time is made. CR 73.08.

Robert J. Greene, Perry & Greene, Paintsville, for appellant.

E. H. Tackett, Pikeville, J. Keller Whitaker, Workmen's Compensation Bd., Frankfort, for appellees.

DAVIS, Commissioner.

On November 18, 1968, appellant filed in this court a certified copy of an adverse judgment of the Johnson Circuit Court, along with a certified copy of a notice of appeal from that judgment which was filed in the Johnson Circuit Court on July 26, 1968. These papers were accompanied by appellant's motion for an extension of time of thirty days from and after November 24, 1968, in which to file the record in this court. There was nothing in the documents filed by appellant to suggest that the circuit court had extended the time for filing the record in this court beyond the

normal sixty-day period provided in CR 73.08. Since the documents presented by appellant indicated on their face that more than sixty days had elapsed since the notice of appeal had been filed, we denied the motion to extend the time for filing record and dismissed the appeal. The appellant has now filed a motion to reconsider that ruling and has accompanied the motion with a certified copy of an order entered September 20, 1968, in the Johnson Circuit Court extending the time for filing record on appeal to and including November 24, 1968. Thus, it is now made to appear that CR 73.08 had been followed in the circuit court and that the time for filing record in this court was timely extended as permitted by CR 73.08. When appellant moved this court to further extend the time for filing record, the time for filing had not expired.

[1] Because there is an apparent misunderstanding among some members of the Bar of the meaning of CR 73.08, we are undertaking now to explain the proper practice under that rule. When this court is requested to extend the time for filing a record on appeal, as permitted by CR 73.08, the movant should demonstrate that his time for filing the record has not expired. It is a simple matter for a movant in such a case to provide this court with a certified copy of the circuit court's order extending his time for filing record, so that this court will be apprised of the fact that the movant's time for filing his record has not run out. In substance, this is a practical application of CR 75.10.

[2] A similar principle is involved in respect to CR 73.02. In any appealed case in which a motion was filed under Rule 59 so as to terminate the running of the time for taking the appeal, the record should show the motion and the date on which it was overruled so that this court can be informed whether the notice of appeal was in time.

[3, 4] We are now sustaining the motion for extension of time to file the record on appeal to and including January 6, 1969. We are calling attention to the fact that here-

after we will not grant extensions of time under CR 73.08, unless the movant makes it abundantly clear that his time for filing the record has not already expired when the motion under CR 73.08 is made.

Appellant's motion for extension of time to file record on appeal is hereby sustained, and appellant is granted to and including January 6, 1969, in which to file record on appeal.

All concur.